No. 91.

Brief of Mackey for D. C.

Filed Oct. 11, 1901.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1900.

No. ~~487~~ 91

L. S. CLARK, PLAINTIFF IN ERROR,

vs.

THE CITY OF TITUSVILLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

(17,810)

Eugene Mackey
Counsel for Plaintiff in Er

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L. S. CLARK, PLAINTIFF IN ERROR,

vs.

THE CITY OF TITUSVILLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

STATEMENT OF THE CASE.

The only contention in this case is the constitutionality of an ordinance of the city of Titusville, which we charge with violation of the Fourteenth Amendment. The offending ordinance divides the merchants of the city into so-called "classes" graduated by the amount of annual sales made and imposes upon each of such classes a tax which decreases in rate as the volume or value of the annual sales increases. The following table shows the classes created, the tax imposed upon each and the equivalent rate:

Class No.	Amount of Business.	Tax.	Rate.
10	$ 1,000 or less.	$ 5	5 or more mills
9	1,000 to $ 2,500	10	10 to 4 mills
8	2,500 to 5,000	15	6 to 3 mills
7	5,000 to 10,000	25	5 to 2½ mills
6	10,000 to 20,000	35	3½ to 1¾ mills
5	20,000 to 30,000	50	2½ to 1 2-3 mills
4	30,000 to 40,000	60	2 to 1½ mills
3	40,000 to 50,000	70	1¾ to 1 2-3 mills
2	50,000 to 60,000	80	1 3-5 to 1 1-3 mills
1	60,000 and over.	100	1 2-3 or less.

The plaintiff in error is a merchant of the city and was arrested and sentenced for failure to pay the license tax imposed upon him by this ordinance. At the trial a "case stated" was agreed upon, which will be found printed on pages 1 to 6 of the Record. In this case stated, the ordinance is printed at length.

SPECIFICATIONS OF ERROR.

First. The said court erred in not holding that the ordinance of the city of Titusville, passed and approved, June 25, 1888, and recited in the case stated at length, conflicts with the fourteenth amendment to the Constitution of the United States and is, therefore, unconstitutional, null and invalid, because in subdividing the merchants and taxpayers of the said city and their property into so-called "classes," which differ not in kind, but only in amount or value and then levying or assessing upon each of such so-called "classes," so created, taxes which do not operate uniformly upon the members of each so-called "class," inasmuch as the lowest amount or value of property therein is required to pay the same amount of tax with the highest amount or value of property therein, the ordinance deprives plaintiff in error of his property without due process of law and denies to him the equal protection of the laws.

Second. The said court erred in not holding that the said ordinance conflicts with the fourteenth amendment to the Constitution of the United States and is unconstitutional, null and invalid because in subdividing the merchants and taxpayers of the said city into so-called "classes," which differ not in kind, but only in amount or value, and then levying or assessing upon each of the said "classes," taxes, which decrease in rate or ratio as the value of the "class" increases, the ordinance deprives the plaintiff in error of his property without due process of law and denies to him the equal protection of the laws.

Third. The said court erred in not holding that the said ordinance conflicts with the fourteenth amendment to the Constitution of the United States and is unconstitutional, null and void

because all the so-called "classes" erected by the said ordinance by value or quantity of business or property are but sub-divisions of a class and imposing taxes upon such sub-divisions without regard to a common ratio, either as between the several sub-divisions themselves, or as between the members of each of the said sub-divisions deprives the plaintiff in error of his property without due process of law and denies to him the equal protection of the laws.

Fourth. The said court erred in not holding that the classification attempted by the said ordinance deprives plaintiff in error of his property without due process of law and denies to him the equal protection of the laws and conflicts with the fourteenth amendment to the Constitution of the United States, and that the ordinance is unconstitutional, invalid and null.

Fifth. The court erred in affirming the judgment or sentence imposed upon the plaintiff in error by the Court of Quarter Sessions of Crawford County, Pennsylvania, and in not discharging him from custody.

ARGUMENT.

At the very threshold of our argument, we presume this Court desires to be fully advised that a federal question was properly raised in the the State Courts. And in doing so, we are at liberty to refer this Court to the opinions of the Lower Courts or to any other portion of the record.

Railroad Co. v. Marshall, 12 How. 165.
Cousin v. Blane, 19 Ibid. 202.
Murdock v. Memphis, 20 Wall 590.
Grass v. Mortgage Co., 108 U. S. 485.
United States v. Taylor, 147 Ibid 700.
Sayward v. Denny, 158 Ibid 183.
Egan v. Hart, 165 Ibid 190.
Sully v. American National Bank, 178 Ibid 298.

It will be sufficient even if the federal question be raised for the first time in the Supreme Court of the State.

Sully v. American National Bank, supra.

As this case was tried and argued in the Quarter Sessions of Crawford county upon an agreement of facts or "case stated," there are no pleadings in the case. But upon this argument, the Judge of the Quarter Sessions handed down a written opinion printed in the record, in which will be found the following statement:

"The defendant denies the legality of the ordinance upon two grounds, viz:

"Frst—* * * * *

"Second—The tax imposed is not uniform and the classification adopted is prohibited by the Fourteenth Amendment to the Federal Constitution."

Again:

"Let us then examine the second objection to validity of this ordinance and bearing in mind that it is a tax levied for general revenue purposes, determine whether the taxes levied by virtue thereof and under the classification therein adopted, are forbidden by the Fourteenth Amendment to the Federal Constitution."

The Superior Court of Pennsylvania said:

"The municipal legislation is alleged to be in violation of the provisions of the Federal Constitution and of the Constitution of the Commonwealth."

The third assignment of error filed before argument in the Supreme Court of Pennsylvania reads:

"The Court erred in not holding the ordinance in question unconstitutional because it denied to the prisoner the equal protection of the laws of this Commonwealth and thereupon conflicted with the fourteenth amendment to the Constitution of these United States."

After this examination of this preliminary question, which, we think, will be satisfactory to this Court, we will proceed with our argument.

WHAT IS THE NATURE OF THE POWER EXERCISED IN IMPOSING THIS TAX?

Both the act of the General Assembly of Pennsylvania, approved May 24, 1887, P. L. 217, and the act approved May 23, 1889, P. L. 287, under which the ordinance in question was passed and under which the city of Titusville is now doing business, in defining the powers conferred upon cities of the class, to which Titusville belongs, say they

"shall have power to levy and collect, for general revenue purposes, a license tax not exceeding one hundred dollars each, annually, on all auctioneers, contractors, druggists, hawkers, peddlers, produce or merchandise venders, bankers, brokers, pawn brokers, merchants of all kinds, persons selling or leasing goods upon instalments, grocers, etc. * * * * * * * * and to regulate the collection of the same."

The title of the ordinance in question reads as follows

"An ordinance to provide for the levy and collection for general revenue purposes of annual license taxes in the city of Titusville."

The most scrutinizing examination of the ordinance itself, will fail to disclose any provision whatever for the regulation, control, supervision or inspection of any of the several businesses therein taxed. There is an absolute absence of any such provisions. The ordinance simply and solely levys a tax for the general revenues of the city and provides for its collection. We contend that the licenses imposed under the ordinance are not an exercise of the police power of the Commonwealth of Pennsylvania, but of the ordinary power of taxation.

Judge Dillon, in his work on Municipal Corporations, at page 766, says:

"The power to regulate and license particular branches of business or matters, is usually a police power; but when license fees or exactions are plainly imposed for the sole and main purpose of revenue, they are in effect taxes."

Judge Cooley (Constitutional Limitations, 201) says:

"A license is issued under the police power, but exaction of a license fee with a view to revenue would be an exercise of the power of taxation."

Beach, in his work on Public Corporations, § 386, says:

"The authority to license and regulate particular branches of business is usually regarded as a police power, but where licenses are imposed for purposes of revenue, they are taxes."

Tiedeman on Municipal Corporations, says:

"The license can only take one of two forms; either it is a tax upon the trade or business and then its legality or illegality is determined by its compliance with the constitutional restrictions upon the power of taxation, or it is a police regulation, which finds its justification and limitation in the prevention of some threatened evil."

In Railway Company v. Hoboken, 41 N. J. Law, 79, Depue, J., in delivering the opinion of the Court says:

"The exaction of a license fee for revenue purposes is clearly an exercise of the power of taxation."

In St. Louis v. Insurance Company, 47 Mo. 162, the Court says:

"A license is issued under the police power, but the exaction of a license fee with a view to revenue would be an exercise of the power of taxation."

In State v. Hoboken, 4 Vrooman, 282, the Court says:

"In the classification of corporate powers, the distinction between the power of taxation and the usual police powers, which are granted for the maintainance of peace and good order in the city and the administration of its internal affairs, is well settled. The functions of the latter are not primarily the raising of revenue."

Therefore, the statutes of Pennsylvania empowering the city to license for revenue and the title of the ordinance declaring it to be for revenue, and the body of the ordinance itself containing no provision for the regulation, inspection, supervision or control of the lines of business licensed, it is clearly not a police regulation, but an act of taxation. That this is true is conclusively shown by Mr. Justice Brewer in Brennan v. City of Titusville, 153 U. S., 289, where in an examination of the very ordinance now attacked by us, he says:

"The ordinance itself is entitled, 'An ordinance to provide for the levy and collection for general revenue purposes of annual license taxes in the city of Titusville,' and the special section requires a license for transacting business, the license being graded in amount by the time for which it is obtained. This license, therefore, the failure to take out which is the offense complained of and for which defendant was sentenced, is a license for 'general revenue pur-

poses,' within the very declarations of the ordinance. * * * * Because a license may be required in the exercise of the police power, it does not follow that every license rests for its validity upon such police power. A state may legitimately make a license for the privilege of doing a business one means of taxation and that such was the purpose of this ordinance is obvious, not merely from the fact that in the title it is declared to be for 'general revenue purposes,' but also from the further fact that so far as we are informed by any quotations from or references to any part of the ordinance, there is no provision for any supervision, control or regulation of any business for which by the ordinance a license is required. In other words, so far as this record declares, this ordinance sought simply to make the various classes of business named therein pay a general tax for the general revenue of the city."

This ordinance of the city of Titusville, being an act of taxation and not of regulation and police power, distinguishes the case at bar from Gundling v. Chicago, 177 U. S. 185, which was an exercise of the police power. Mr. Justice Peckham therein thus quotes from counsel's brief.

"That the ordinance is unconstitutional and void as being an unreasonable exercise of the police power by imposing a license fee, etc."

And on page 188, referring to the ordinance of Chicago, says:

"Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the state to determine and their determination comes within the proper exercise of the police power by the state."

UPON WHAT IS THIS TAX IMPOSED?

It is clearly not upon the right to receive property from a decedent either as a legatee or heir, and, therefore, the rule in Magoun v. Illinois Trust & Savings Bank, 170 U. S., 283, and kindred cases does not apply. Those cases were argued and decided upon the principle that neither heir nor legatee has a natural inherent right to receive property from a decedent; that in a state of nature the property acquired by man upon his death reverted to the common fund; that the right to inherit as heir or receive as legatee are purely of statutory origin, and when the state creates such a right, it is in

the nature of a bounty or gift and she may attach thereto any "bonus," "tax" or "condition" she sees fit. The heir or legatee is not bound to accept the gift or bounty, but, if he does, he must take it burdened with the "tax," "bonus" or "condition." That is not the case at bar. Both by the Revealed Law, the law of nature and municipal law, man is bound to labor. To labor is not a gift from organized society, but a natural right. Yea, more, it is a duty imperatively imposed. The command of the Omnipotent is, thou shalt labor. Nature says you must or starve. The law of municipal action is, you must or be punished; for all the states, or at least that of Pennsylvania, from whence this appeal comes, have passed laws punishing vagrancy and idleness. The merchant of Titusville has, therefore, more than permission to labor. He is bound and commanded to do so. When the Commonwealth imposes an unjust and inequitable tax upon his labor or the fruits thereof, she cannot excuse herself by declaring to the merchant, To labor is a gift from me, you are not bound to do so, you may refuse to do so and thus avoid the "burden," "tax" or "bonus."

The tax assailed is assessed against the merchant by name, but this is true of all taxes, for inanimate things, and dumb beasts do not pay taxes. Their owners do that. This tax is upon the merchants' property. This is true, whether it be considered a tax upon his business or upon the merchandise sold. If the latter, it is clearly so. It is, however, not a tax upon the business, for by the terms of the ordinance the assessor does not assess the business of the merchant, but passes beyond that and assesses the amount of merchandise sold by the merchant during the year. The tax is, therefore, upon this and not the business itself. But, even if it were upon the latter, yet still is it a tax upon property, for business is property. If a citizen be damaged in it, even though his stock of merchandise remains intact, yet no court would hesitate to award him damages in dollars and cents. The lawyer has a property in his profession, the physician in his practice, and even the day laborer in his occupation. To deprive a citizen of either is to deprive him of vested rights. Furthermore, this Court has over and over again, held that a tax upon a business is a tax upon the article

sold. In the often cited case of Brown v. Maryland, 12 Wheaton, 419, the Court, through Chief Justice Marshall, say:

"All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself."

In Wilton v. Missouri, 91 U. S., 278, Mr. Justice Field, speaking for this Court, said:

"The general power of the state to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the Federal Constitution. When the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the state to levy, it matters not whether it be raised directly from the goods or indirectly through the license to the dealer."

DOES THE ORDINANCE ASSAILED CONFLICT WITH THE FOURTEENTH AMENDMENT?

We first charge the ordinance with inequality among the members of each so-called "class." Take for example the seventh class, the members of which make annual sales of merchandise ranging from $5,000 to $10,000. Each member is assessed with a tax of $25. Is it equality to assess the annual sales worth $5,500 with the same tax as that assessed against $10,000? The same inequality can be found in each of the other so-called classes. We contend the amendment requires the state, whenever property or business is ranged or grouped into so-called classes, according to value, to assess thereon a percentage tax and not a specific one; the former, of which would insure absolute equality in taxation.

Secondly, we contend the state or city cannot arbitrarily carve out from either business or property an independent class, distinguished only by its value or quantity, and assess thereon a tax out of all proportion to that levied upon other like business or property. We do not deny the right of the state to classify generally, but contend that all classes chosen as the subject of a tax must be such as the Legislature finds and not such as it arbitrarily erects according to quantity or value, and that even if such classification

be permitted, there must be a common ratio between the taxes on the several classes, which, although denominated such in this ordinance are in reality nothing but sub-divisions of a class. Retail grocers constitute a class. Those doing a business of from $50,000 to $60,000 constitute only a sub-division thereof. A retailer selling annually $60,000 of groceries, differs in neither kind, circumstances nor condition from one selling $2,500 of groceries. They both handle the same class of merchandise, deal in the same manner, assume the same risks and bear the same relation to each other and to their fellow citizens. Why should the former pay a tax of one mill on the dollar of merchandise sold and latter [redacted] ten? Yet so this ordinance directs. We are now not discussing the wisdom of the tax, but of the power of the state and city to exact it. If the power exists to arbitrarily vary the tax in any degree whatever according to the amount of merchandise sold, the city may do so without limit and arbitrarily create favored classes according to quantity or value and release them wholly or nearly so from the burden of taxation and impose it wholly upon less favored ones, selected in the same manner. It may erect an arbitrary class of lawyers by selecting those who do abusiness of say ten thousand dollars or less per annum and visit a tax upon them and relieve lawyers doing a larger annual business wholly or nearly so from taxation. It may do the same with physicians, salaried men, or any other line of occupation or business. Such arbitrary power, we contend, is denied to every state by this amendment, which insures to every citizen equal and just laws of taxation and forbids classification, which is such only in name and in reality is nothing but selection. While we recognize that this Court is not an open harbor, to which every citizen may, under the fourteenth amendment, fly for relief from every unjust tax, yet we believe this Court will readily extend its assistance whenever a tax is visited upon a citizen by a state or city, which not merely in its practical operation works an injustice, but on its very face is clearly and intentionally unequal and unjust and which under the guise of an arbitrary classification selects the poorer and less fortunate members of a natural class of citizens for a severe tax while it entirely or almost so, relieves the wealthy or fortunate ones therefrom. It is true the four-

teenth amendment requires no cast iron rule of equality in taxation, but only that all persons subjected to legislation be treated alike under like circumstances and conditions. Take two retail grocers in the city of Titusville. They are both on the same street and almost side by side. They have the same sized store rooms, handle the same class of goods, carry the same sized stock of groceries, deal in the same manner, assume the same risks and bear the same relations to each other and to organized society. Wherein are they different in either circumstances or condition? Taxation is not regulation, but the taking by the state of the citizen's property sufficient to meet the financial needs of the government. Why should not these two grocers contribute in the same proportion? What is there so different in their condition or circumstances that would justify taking from the poorer one for the needs of the city ten mills on the amount of his annual sales and from the richer one, only one? If such artificial classification and indiscriminate taxation may be indulged in by the states, class legislation will run riot. Such unjust and unequal laws, if permissible, present to the Legislature an effective method to vent its passion or prejudice and impair, wreck or destroy legitimate business, property and occupation. All safeguards against class legislation will be thrust aside and in times of great financial distress and under its pinch, the poor and unfortunate have here the means to take from the stores of the industrious and frugal. At other times the powerful and greedy may impose upon the weak and unfortunate, the major part or the whole of society's rapidly growing expense. Either course is wrong and to be deplored and is forbidden by the amendment we invoke and which we must seek when our state courts refuse us relief. This amendment is the embodiment of the fundamental principle of our government — the equality of all men before the law. Every American citizen is the equal of his neighbor. Equal not only in right, but also in the burden of maintaining the government. The rule of faith, that he who has little shall lose it and he who has much shall have it added to, although the city of Titusville, judging from this ordinance, must think so, does not pertain in matters of taxation. There he who has much shall contribute much and he who has little, little; but always in

exact and equal proportion. Not one copper must the rich or poor contribute over his proportion, percentage or ratio.

In Yick Wo v. Hopkins, 118 U. S., 356, we find a concise declaration of what is meant by "equal protection of the laws":

"The equal protection of the laws is a pledge of the protection of equal laws."

And in the Railroad Tax Cases 13, Fed. Rep., 722, Mr. Justice Field declared:

"The fourteenth amendment to the Constitution, in declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all powers of the state which can touch the individual or his property, including among them that of taxation. * * * * * What is called for under a constitutional provision requiring equality and uniformity in the taxation of property must be equally called for by the fourteenth amendment. The forced contribution from one which would follow taxation of his property without reference to a common ratio, would be inconsistent with that equal protection, which the amendment requires the state to extend to every person within its jurisdiction."

And again in County v. Southern Pacific Railroad Company, 18 Fed. Rep., 385, the same distinguished jurist said:

"Until the adoption of the fourteenth amendment, there was no restraint to be found in the constitution of the United States against the exercise of such power by the state. * * * * The first section of the fourteenth amendment places a limit upon all the powers of the state, including among others, that of taxation. * * * * Unequal taxation, so far as it can be prevented is, therefore, with other unequal burdens, prohibited by the amendment."

In Gulf, Colorado and Santa Fe Ry. v. Ellis, 165 U. S. 150, Mr. Justice Brewer said:

"Yet it is equally true that such classification cannot be made arbitrarily. The state * * * * may not say that all men beyond a certain age shall be alone thus subjected or all men possessed of a certain wealth. There are distinctions which do not furnish any proper basis for the attempted classification."

The classes attempted to be arbitrarily created by the ordinance assailed, are not such, but merely sub-divisions of a class. These sub-divisions are not independent of each other and, therefore, the tax levied upon them must have some fixed ratio. For example,

in Williamsport v. Wenner, 172 Pa. St., 173, when a somewhat similar tax was upheld, the size of the initial class was $1,000 and the tax imposed $1.00. The next class was from $1,000 to $5,000, five times as large, and it paid $5.00, five times as large a tax. The next class was from $5,000 to $10,000, ten times as large, and paid a tax of $10.00, ten times as large, and so on, each class as it increased in size paid a tax which increased in the same ratio. In the case at bar, the rate decreased as the class increased. This is wrong. Judge Cooley, in his work on Taxation, at page 2, says:

"In an exercise of the power to tax, the purpose always is, that a common burden shall be sustained by common contributions, regulated by some fixed general rule and apportioned by the law according to some uniform ratio of equality."

And on page 169, he says:

"A license tax might not be unjust though laid upon a single occupation, provided that it was so laid that none who followed that occupation escaped it. Let it reach all of a class, either of persons or things, it matters not whether those included in it be one or many, or whether they reside in any particular locality or are scattered all over the state. But when, for any reason, it becomes discrimination between individuals of the class taxed and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality and becomes inadmissible. It is immaterial on what ground the selection is made, whether it is because of residence in a particular portion of the taxing district, or because the persons selected have been remiss in meeting a former tax for the same purpose or because of any other reason, plausible or otherwise; for, if the principle of selection be once admitted, limits cannot be set to it and it may be made use of for the purpose of oppression or even of punishment."

And again, on page 243, he says:

"But the requirement of apportionment is absolutely indispensible in any exercise of the power to tax. There can be no such thing as valid taxation when the burden is laid without rule, either in respect to the subject of it or to the extent in which each must contribute. In this respect the Legislature is as powerless as any subordinate authority. It being impossble there should be taxation that is at once arbitrary and valid. Whenever, therefore, the tax is to be levied upon property, agents for its apportionment by the prescribed rule are as indispensible as the rule itself. And the rule they have to perform is, to make the sum demanded of any person or laid upon any one parcel of property have some fixed ratio, not only to the whole tax, but also to that demanded of every other person or laid upon every other piece of property. Without this,

as has been forcibly said, the exactions of money for the public are mere forced contributions and taxation will differ from eminent domain only in this: that the latter demands the property from the citizen when necessity requires it and on making compensation, while the former exacts at discretion and without compensation."

We are not unfamiliar with the argument that our position is a contention that self-government is a failure and that we may safely rely upon the good sense of the Legislature not to pass any arbitrary taxation. If this be true, why have a Constitution? Why hedge the Legislature about with limitations of its power, if it will never abuse that power? Man generally is bound to err, either intentionally or through ignorance, and human nature in the Legislature does not differ from human nature elsewhere. It was to protect the citizen against the errors of the Legislature, whether intentional or through ignorance, that written Constitutions were adopted. While we have much faith in the Legislature, we have infinitely more in the Constitution. The plaintiff in error prefers to seek its protection in this Court, rather than rely upon the platitude that popular government is not a failure.

Neither are we unfamiliar with the argument that some of the taxes, which we cite as possible to be levied, are extreme ones and have not been and may never be imposed by the city. In reply, we say the question before this Court is the existence of a power of classification and taxation and not of the degree to which it has been carried. If it exists at all, it may be exercised to the extent we have claimed. An ordinance is just as unconstitutional when it offends against the Bill of Rights in the smallest degree as when it does so in a gross degree. In either case it is the exercise by the state of a power which the Constitution says the state shall not exercise. We repeat to this Court the following words of Mr. Justice Bradley in Boyd v. United States, 116 U. S., 616, and which was cited by this Court in Gulf, Colorado & Sante Fe Railroad v. Ellis, 165 U. S., 150:

"Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal methods of procedure. This can only be obviated by

adhering to the rule that constitutional provisions for the securing of persons and property should be liberally construed. A close and liberal inspection deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachment thereon. Their motto should be 'obsta principus.'"

We respectfully submit that the ordinance and tax complained of, conflict with the Fourteenth Amendment and are, therefore, invalid, null and void and the prisoner should be discharged from custody.

EUGENE MACKEY,

Counsel for Plaintiff in Error.

October 5, 1901.